79-170

Supreme Court, U. S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES J. RYAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

James J. Ryan v. United States of America, No. 78-1833, April 23, 1979, unpublished order per Circuit rule 35.

JURISDICTION

During certain times in 1971 and 1972, MR. JAMES RYAN was an employee of two Illinois corporations, O'Hare

Installation, Inc., and O'Hare Warehouse, Inc. During this period, these companies allegedly became delinquent with regard to the payment of certain withholding tax payment, although tax returns were timely filed. In July of 1975, the Government garnished MR. RYAN'S wages in an attempt to collect the alleged unpaid portion of the subject withholding tax, relying upon Internal Revenue Code Section 6672.

MR. RYAN filed suit in the U.S. District Court for the Northern District of Illinois to recover his money, and the Government counterclaimed for the remaining amount.

Judgment was entered on the jury verdict against MR. RYAN and in favor of the Government. An appeal to the Seventh

Circuit resulted in the Order of April 23, 1979, reproduced in this Petition, affirming the trial court.

QUESTION PRESENTED FOR REVIEW

Did the jury instructions sufficiently define a "responsible party" relative to IRC Section 6672; and was the jury verdict against the manifest weight of the evidence.

APPLICABLE PROVISIONS OF IRC

Section 6672 of the Internal Revenue Code reads in part as follows:

> "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who wilfully fails to collect such tax, or truthfully account for and pay over such tax, or wilfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a

penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

STATEMENT OF THE CASE

O'Hare Installation, Inc., and O'Hare Warehouse, Inc., were incorporated under Illinois law in the summer of 1971. O'Hare Installations was organized to install carpets, while O'Hare Warehouse was organized for warehousing the carpets. (A13). Both corporations were headquartered at 2300 Devon Avenue, in Elk Grove, Illinois. Although Federal Withholding Tax Returns were filed for O'Hare Warehouse for the quarters ending December 31, 1971 and March 31, 1971, and for O'Hare Installations for the quarters ending September 30, 1971, December 31, 1971, and March 31, 1972, neither corporation paid the amount of

tax due for those periods.

During this period, MR. JAMES RYAN worked for these corporations in sales, and was paid strictly on commission basis. (A10). These corporations ceased doing business in the spring of 1972. Subsequently, the Government attempted to investigate the possibility of collecting the unpaid portion of the tax from MR. RYAN, pursuant to IRS Code Section 6672.

On January 20, 1975, MR. RYAN met with MR. MARK GORDON, of the Appellate Division of the Department of Internal Revenue regarding a possible assessment of tax against MR. RYAN. At that time, MR. GORDON related that a decision had not yet been reached on whether or not an assessment would be made against MR. RYAN.

MR. RYAN had no further communications with the Department until July of 1975, when his wages were garnished. This garnishment was the result of an alleged assessment for withholding taxes which had been fixed against him on January 1, 1975. MR. RYAN filed a law suit against the Government to recover that money. THE UNITED STATES counterclaimed for the remaining amount of the withholding tax, counterclaiming against two additional parties alleged to be responsible persons under IRS Code Section 6672.

At Trial, evidence that Carpet Direct, Inc., a Corporation located in Mt. Prospect, Illinois and engaging in the retail sale of carpet, wrote certain checks to satisfy some of the obligations of both O'Hare Installations and O'Hare Warehouse

was admitted over the objection of Plaintiff's Counsel. (A29, A30, and A31). No evidence was offered or admitted at Trial that a demand for the taxes was made on O'Hare Warehouse or O'Hare Installations or that these taxes were at anytime uncollectable against said corporations.

Judgment was entered on the jury's verdict, dismissing Plaintiff's Complaint against the UNITED STATES and ordering that the Government recover of the Plaintiff, $16,520.14 plus interest and costs. Plaintiff's Post Trial Motion for a new trial was denied, and it is from that Order which Plaintiff now Appeals.

ARGUMENT

In determing whether an employee is a "responsible party" under IRC Section 6672, the Court is to look at the facts in each case. Plaintiff cited several cases in his brief showing where persons, who had much more authority over what bills were to be paid, and who also were co-signers on certain corporate accounts, were not found to have the ultimate authority over policy decisions of the company and expenditures of its funds to be held responsible under the statute. Bauer v. United States, 543 F. 2d 142; White v. United States, 372 F. 2d 513; Bernardi v. United States, 507 F. 2d 682.

These cases also hold that mere negligence in failing to ascertain facts

regarding a tax delinquency is insufficient to constitute willfulness under the code.

The cases cited by Plaintiff were neither distinguished nor contradicted by Defendant or by the Seventh Circuit Court of Appeals.

The Court rejected the jury instructions pertaining to the negligence aspect of the definition of willfulness which Plaintiff offered. The Court overruled Plaintiff's objections to Defendant's jury instructions which did not incorporate the negligence aspect of the definition of willfulness.

By not incorporating the complete definition of a responsible person relevant to IRC 6672 in the jury instructions, the trial Court committed

reversible error. The Seventh Circuit Court of Appeals erroneously affirmed the decision when it refused to talk to the cases and authority cited in Plaintiff's brief.

CONCLUSION

Petitioner respectfully requests that this Court grant a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued April 20, 1979)

April 23, 1979

Before
Hon. Philip W. Tone, Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Gus J. Solomon, Sr. District Judge*

JAMES J. ..YAN, Plaintiff-Appellant,	)Appeal from the) United States) District Court of
No. 78-1833 vs.	) Illinois,) Eastern Division
UNITED STATES OF AMERICA, Defendant-Appellee.	)No. 75-C-3252
	)George N.) Leighton, Judge.

O R D E R

The evidence supports the finding that the notice requirements of the statute were satisfied (and appellant's failure to argue in his brief that this issue

should have been submitted to the jury waives that argument). Assuming appellant is arguing that the evidence is insufficient to show that he was a controlling person, that argument is without merit. The admission of evidence and instructions to the jury concerning checks issued by Carpet Direct, Inc. were proper in view of the government's theory that appellant, who controlled all three companies, chose to use for another purpose resources that could have been made available for payment of the tax. Accordingly, the judgment is affirmed.

AFFIRMED

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* The Honorable Gus J. Soloman, Senior District Judge of the United States Court for the District of Oregon, is sitting by designation.